IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 TCK-SAJ**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE′S, INC., GEORGE′S FARMS, INC., SIMMONS FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., GEORGE′S, INC., GEORGE′S FARMS, INC., SIMMONS FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Third Party Plaintiffs,	)	
vs.	)	
CITY OF TAHLEQUAH, *et al.*,	)	
Third Party Defendants	)	

RESPONSE OF DEFENDANT SIMMONS FOODS, INC. TO STATE OF OKLAHOMA'S MOTION TO COMPEL RESPONSES TO STATE'S MAY 30, 2006 REQUESTS FOR PRODUCTION

Defendant Simmons Foods, Inc. ("Simmons") hereby submits its Response to the State of Oklahoma's Motion to Compel responses to its May 30, 2006 Set of Requests for Production and Brief in Support (Dkt. #897) ("Motion to Compel"), and states as follows:[1]

I. INTRODUCTION

The nature of this discovery dispute can be summarized very simply – the State propounded discovery requests to several of the Defendants who were also defendants in the *City of Tulsa v. Tyson Foods, Inc.* case, (No. 01-CV-0900EA(C), hereinafter the "Tulsa lawsuit") requesting among other things, that each defendant produce—without any limitation whatsoever—"copies of all documents and materials made available for inspection and copying by you [each defendant] to the plaintiffs in the [Tulsa lawsuit]. Simmons objected to these requests on multiple grounds, and in particular on the basis that the Tulsa lawsuit involved entirely distinct poultry operations in a separate watershed, involved terrain, hydrology, reservoirs, point sources, third-party operations, experts, alleged injuries and issues that were entirely different from those at issue in the State's lawsuit over the Illinois River Watershed, which rendered the State's requests impermissibly overly broad and burdensome. When Simmons participated in the meet and confer session with the State's counsel, Simmons's counsel advised that if the State would make some reasonable effort to define the topics and documents it believed were relevant to the instant lawsuit, Simmons would be willing to further respond in an attempt to accommodate a more reasonable scope of discovery. The State's counsel flatly refused

[1] Simmons maintains and reasserts its prior objections to the State's requests for production to the extent that this Response does not directly address them, including objections to the extent the requests seek Simmons's confidential business information and trade secrets.

to expend any effort to narrow its requests, and demanded that Simmons screen the mass of Tulsa documents, determine what is relevant, and produce them.[2] Simmons expressed its view that this response was improper under the Federal Rules of Civil Procedure, and this Motion to Compel followed.

Further, the State's wholesale request for documents produced in the Tulsa lawsuit is followed by five additional blanket requests for *all* privilege logs, *all* written discovery responses, *all* employee deposition transcripts, *all* expert deposition transcripts and *all* "documents and materials referring, relating or pertaining to the implementation of and compliance with the terms of the consent order entered in the *City of Tulsa v. Tyson Foods, Inc.*, 01-CV-0900, lawsuit." *See* Motion to Compel, Exhibit "A" at Request Nos. 2-6. Finally, the State requests that Simmons produce all joint defense agreements pertaining to the instant lawsuit. *See* Motion to Compel, Exhibit "A" at Request No. 7.

In the first instance, the State's requests for production of *all* documents from another litigation without any apparent attempt to craft requests to reach documents with evidentiary value in the current lawsuit amounts to a fishing expedition which is both inappropriate and prohibited under Federal Rule of Civil Procedure 26. Nevertheless, the State seeks to justify its deficiently drafted discovery by contending that its objective was "to save *all the parties* involved time and money." *See* Motion to Compel at 2 (emphasis added). This claim is untenable, as the mass of documents swept up in these requests

[2] In the meet and confer session, the State's counsel admitted that they had prepared a list of "issues" relating to the Tulsa lawsuit, which they claimed were guiding their discovery efforts. When the defense counsel asked to be provided with the list so that they could narrow the scope of the dispute, the State's counsel refused, and held fast to their broad requests.

exist, for the most part, in only hard copy form, and filled over 50 boxes. Notwithstanding the similarities the State claims between this lawsuit and the Tulsa lawsuit, the State's May 30, 2006 requests for production far exceed the scope of relevancy of any claim or defense at issue in this lawsuit. Furthermore, the State has not, as otherwise required by Rule 26, demonstrated that its overly broad and burdensome requests are supported by the good cause contemplated under Rule 26 to gain access to the otherwise irrelevant, undiscoverable documents requested through its May 30, 2006 discovery.

At first glance it may appear that there are similarities between this lawsuit and the Tulsa lawsuit.[3] However, when one looks behind the State's bare statement that the lawsuits are closely related it becomes apparent that the only similarity is that allegations of excess nutrient loading are made in both cases.

Under Rule 26, the State must demonstrate that the materials requested from the Tulsa lawsuit, as well as any current joint defense agreement, have some evidentiary value in this lawsuit. The blanket requests that are the subject of its Motion to Compel do not pass muster under this standard. The State cannot reasonably contend that every document, every grower file, every expert's file, every privilege log or every deposition transcript referring, relating or pertaining to the Tulsa lawsuit and the joint defense agreements in this action are relevant or will lead to the discovery of admissible evidence in this action. Accordingly, the State's Motion to Compel should be denied with regard

[3] It is interesting to note that the State sets forth a laundry list of purported similarities between the cases, but it fails to support any claim that the documents from the Tulsa Lawsuit will actually be probative of any issue in the instant case. Using the State's loose logic, a party could freely probe into another party's prior litigation without making any showing of actual relevance to the matter at hand by simply alleging that the nature of the lawsuits were similar. Rule 26 requires more.

to the overly broad, burdensome and irrelevant Requests for Production Nos. 1 through 7, and they should be directed by the Court to revise their requests to include a more appropriate scope, which would enable Simmons to respond.

II. ARGUMENT AND AUTHORITY

A. The State is Not Entitled to Conduct a Fishing Expedition into Prior Litigation Involving the *City of Tulsa* Case

By failing to articulate any definable scope of discovery other than simple blanket requests, the State's requests constitute no more than a mere fishing expedition and an improper attempt to harass Simmons. Courts have recognized that '[t]he legal tenet that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow *fishing expeditions* in discovery.'" *Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (quoting *Zenith Electronics Corp. v. Exzec, Inc.*, 1998 WL 9181, at *2 (N.D.Ill.1998) (emphasis added). It is long established that discovery cannot be used "merely to vex or harass litigants." *Keenan v. Texas Production Co.*, 84 F.2d 826, 828 (10th Cir. 1936). "Neither can it be utilized for a mere fishing expedition, nor for impertinent intrusion." *Id.* Furthermore, 'the district court . . . is not "required to permit plaintiff to engage in a 'fishing expedition' in the hope of supporting his claim."' *Martinez* at 218 (quoting *McGee v. Hayes*, 43 Fed.Appx. 214, 217 (10th Cir. 2002). There may well be some relevant and discoverable documents contained within the tens of thousands of pages swept up in the State's requests, yet the impermissible burden of these requests stems from their complete lack of limitation thereby encompassing a significant volume of documents and information that are in no manner relevant to any claim or defense in this lawsuit. The State's requested discovery constitutes an impermissible endeavor to compel an opposing party to produce a mass of

documents from previous litigation involving different operations in a different watershed based on the mere whim that there may be a few documents of interest discovered.

1. The State's Requests for Production Are Overly Broad, Unduly Burdensome, and Include a Mass of Irrelevant Documents

The State's unlimited requests for production are overly broad and unduly burdensome. In the case of *Audiotext Communications v. U.S. Telecom, Inc.*, the court denied the plaintiff's motion to compel discovery to the extent that they exceeded relevant issues in the litigation. The court stated:

> Requests should be reasonably specific, allowing the respondent to readily identify what is wanted. Requests which are worded too broadly or are too all inclusive of a general topic function like a giant broom, sweeping everything in their path, useful or not. They require the respondent either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request. The court does not find that reasonable discovery contemplates that kind of wasteful effort. In this instance the court finds that most of these requests fail the test."

Audiotext Communications v. U.S. Telecom, Inc., 1995 WL 18759 * 1 (D. Kan. 1995). The total discovery materials from the *City of Tulsa* case sought by the State's requests fill in excess of 50 document boxes containing tens of thousands of documents available only in paper form. A mere sampling of the completely irrelevant topics covered by the State's requests include:

- Nutrient Management Plans for hundreds of Eucha/Spavinaw ("E/S") poultry growers;
- Contract addenda for of E/S poultry growers;
- Flock settlement print outs for hundreds of E/S poultry growers;
- Vaccination and mortality records for hundreds of E/S poultry growers;
- Poultry house time and temperature records for hundreds of E/S poultry growers;

- Propane purchase records for hundreds of E/S poultry growers;
- Flock inspection reports for hundreds of E/S poultry growers;
- Grower files for of E/S poultry growers;
- Depositions of dozens of E/S poultry growers;
- Policies and procedures for the operation of Simmons's processing plant, including records of the operation of Simmons's wastewater pre-treatment facility;
- Expansive logs of privileged and confidential documents responsive to Tulsa's discovery requests;[4]
- Reports, depositions and files of at least five experts covering irrelevant topics such as, Simmons's wastewater treatment and it "purported" effect of Spavinaw Creek; the operations of Tulsa's Wastewater treatment lagoons at lake Eucha; Tulsa's management of Lake Eucha and Spavinaw; Tulsa's potable water treatment technologies, plants; water quality of streams, groundwater and reservoirs in E/S Watershed; impacts of third-parties identified in the E/S Watershed; criticisms of the Plaintiffs' experts' principles and methodologies; modeling of hydrology and reservoirs in the E/S Watershed; Analysis of Tulsa's claimed taste and odor complaints; maintenance of Tulsa's water distribution system;[5] and
- Documents pulled from Tulsa's files relating to the watershed, the lagoons, taste and odor, and water treatment.

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[4] The question of the State's request for privilege logs is interesting. If Simmons is required to produce any of the Tulsa lawsuit documents in this case, and that production includes any privileged or confidential documents, those documents will have to be logged in this case. The claims of privilege in a prior case are inextricably intertwined with the production of those underlying documents. If the scope of the production is narrowed by virtue of the Court's Order on the instant Motion, it would be improper to require Simmons to disclose, by virtue of producing its prior logs, the existence of other non-responsive documents, and thus as a stand alone request, the State's pursuit of the Tulsa privilege logs should be denied.

[5] The work product of these experts has no relevance to the Illinois River Watershed, and since Simmons has not designated any of the same experts to testify for it in this case, these reports and materials cannot be used as impeachment material. Should Simmons designate any of the experts used in the Tulsa lawsuit, Plaintiffs can re-issue requests related to their prior work.

Thus, it is apparent that if the State's motion to compel were granted, Simmons would be subjected to the same abusive and wasteful form of discovery that the *Audiotext* court denied. Thus, the State cannot reasonably contend that its overly broad and burdensome requests for production are "simply an effort to save *all the parties* involved time and money." *See* Motion to Compel at 2 (emphasis added). Thus, the overwhelming amount of irrelevant, or at best, marginally relevant documents and materials swept up in the State's requests render them clearly overly broad and unduly burdensome.

The State advances the erroneous claim that Simmons's assertion of burdensomeness is too conclusory and further suggests that Simmons failed to allege specific facts to support proposition of burdensomeness. The abundant irony of the State's argument is its own requests for production fail to supply any specificity as to which documents it seeks from the Tulsa lawsuit pertain to the issues at hand. Among others, the State cites *Tucker v. Outsu Tire & Rubber Co.* for the proposition that non-specific objections are insufficient to prevent the requested discovery. *Tucker v. Outsu Tire & Rubber Co.*, 191 F.R.D. 495 (D. Md. 2000). The State's argument fails as Simmons objected to the State's discovery requests in detail as stated in Simmons's responses to the State's May 30, 2006 requests for production and continues to object in this Response. Additionally, the State also refuses to recognize Simmons's objections regarding the relevant statutory periods intended to define a reasonable scope of discovery.[6] Therefore, Simmons has fulfilled its obligations to show specific facts that establish the overly broad and burdensome nature of the State's requested discovery.

2. Based Upon the Facial Over Breadth of The State's Requests Pertaining to the Tulsa Lawsuit, it Has Failed to Meet its Burden to Show Relevance

As set forth in the prior section, the State's requests for production encompass a large number of irrelevant documents and materials that are not discoverable in this case. Federal Rule of Civil Procedure 26 controls the scope of discovery and provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ." Fed. R. Civ. P. 26(b)(1). Courts have held that "a request for discovery should be allowed unless it is clear that the information sought can have no possible bearing on the claim or defense of a party." *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 652 (D. Kan. 2004). "'[T]he object of inquiry must have some evidentiary value before an order to compel disclosure of otherwise inadmissible material will issue'". *Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (quoting *Zenith Electronics Corp. v. Exzec, Inc.*, 1998 WL 9181, at *2 (N.D. Ill. 1998). Here, the State grossly oversimplifies the relevancy issue by asserting that *all* documents and materials requested from the *City of Tulsa* case are somehow relevant to this lawsuit despite its admission that "the instant case and the *City of Tulsa* case are not completely identical." *See* Motion to Compel at 5. Faced with Simmons's showing of the nature of the documents contained within the scope of the State's requests, it would constitute a departure from logic if Simmons were compelled to

[6] The State's requested discovery and the scope of reasonable burden should be limited to the longest period of limitations under the claims asserted, *i.e.*, its CERCLA claims. CERCLA § 112(d), 42 U.S.C. § 9612(d). Despite the State's contention that it is unencumbered by any statute of limitations, several federal courts have specifically recognized the applicability of the CERCLA statute of limitations as states' claims. *See State of Colo. v. ASARCO, Inc.*, 616 F.Supp. 822 (D. Colo. 1985); *State of Idaho v. Bunker Hill Co.*, 634 F.Supp. 800 (D.Idaho 1986); *State of N.Y. v. General Elec. Co.*, 592 F.Supp. 291 (N.D.N.Y. 1984).

produce documents and materials encompassing *all* issues of the *City of Tulsa* case, when—by the State's concession—only *a fraction* of the information sought potentially applies to the issues in this lawsuit. It is the State's burden to propound discovery that reasonably defines the scope of documents sought. It is not Simmons's obligation to sift the mass of documents from the *City of Tulsa* case to make decisions about what might possibly be relevant within the void of these broad requests.

The State fails to acknowledge the most significant distinctions between the Tulsa lawsuit and this action. Both cases involve environmental claims of impact from the land application of poultry litter to water resources. Yet, the setting for the lawsuits are distinct – two separate watersheds. By its very definition, the activities in one watershed cannot, and do not affect the water in another watershed. Further, the alleged impacts in the Illinois River Watershed could only derive from conduct on lands within its boundaries. Thus, how can the ownership, operations, and finances of poultry growers in the E/S Watershed have any probative value on this point in the State's case? They cannot. The same is true for Simmons's processing plant and wastewater discharges. How can the State argue that it needs information regarding how Tulsa managed its reservoirs, water treatment plants, lagoons and distribution system, including the experts' evaluations of these issues to advance its case against the Defendants? It cannot. How can the defense experts' evaluations of the principles and methodologies employed by Tulsa's experts be used in the instant case? They cannot. The distinctions between the two cases make it clear that the scope of State's requests for production include documents and materials having neither evidentiary value nor any bearing on any claim or defense in this lawsuit. Thus, the State's motion to compel should be summarily

denied because the requests are so broadly drafted that irrelevant documents and materials will make up the vast bulk of the documents sought.

The State has failed to meet its burden to establish relevance. "[W]hen the request is overly broad on its face or when relevancy is not readily apparent, the party seeking the discovery has the burden to show the relevancy of the request." *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 649, 652 (D. Kan. 2004). Here, the State's requests are both overly broad on their face and it is not readily apparent how *all* or even a substantial portion of the documents requested are relevant to the issues in this lawsuit.

The State places undue reliance on a single products liability case to claim that all discovery in the Tulsa lawsuit is somehow relevant to its own. *Snowden v. Connaught Labs.*, Inc., 137 F.R.D. 325 (D. Kan. 1991). However, the issues in this lawsuit are significantly different from those in the *Snowden* case. First, unlike *Snowden*, this case is not a products liability case where the requested discovery of the prior litigation involves uniform subject matter, a single identical product. On the contrary, the subject matter of this lawsuit involves allegations of contamination attributed to a multitude of factors that are unique to a given geographic region.

Second, the *Snowden* case does not control because it applies a prior version of Federal Rule of Civil Procedure 26. *Snowden v. Connaught Labs.*, Inc., 137 F.R.D. 325 (D. Kan. 1991). Since the *Snowden* decision, the scope of relevant discovery under Rule 26 has been limited to that which is "relevant to a claim or defense." Fed. R. Civ. P. 26(b)(1). The State inappropriately seeks to use the outdated and broader version of Rule 26 applied in *Snowden* which the court held allows discovery "if there is any possibility

that the information sought may be relevant to the subject matter of the action." *Snowden*, at 329.

Since the amendments to Rule 26, courts have recognized the narrowing of relevant discovery scope "from 'subject matter' of the action to 'claim or defense or defense of any party.'" *Johnson Matthey, Inc. v. Research Corp.*, 2002 WL 31235717 * 2 (S.D.N.Y. 2002) (citing Fed. R. Civ. P. 26(b)(1) advisory committee's note to the 2000 amendment); *see also Martinez v. Cornell Corrections of Texas*, 229 F.R.D. 215, 218 (D.N.M. 2005) (stating that the 2000 amendment was made with the intent "that the parties and the court focus on the actual claims and defenses involved in the action"). The *Johnson Matthey* court ultimately denied a motion to compel similar to the State's seeking discovery of documents related to prior litigation because the request concerned matters which are "in no way relevant to a claim or defense at issue." *Id.* Like that case, the State's requests for production encompass documents and materials from prior litigation that are irrelevant to claims or defenses in *this lawsuit*. Thus, the State's requests for production exceed the scope of relevant discovery permitted under the current version of Rule 26.

Simmons has met its burden required to establish that the State's requests are overly broad due to the lack of relevance:

> When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed.R.Civ.P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.

Owens v. Sprint/United Mgmt. Co., at 652. As explained above, Simmons has shown that the requested discovery exceeds the scope of relevance, and any marginally relevant

information contained in the expanse of the Tulsa lawsuit documents is substantially outweighed by substantial burden and potential harm borne by Simmons if it were required to produce—without the requisite showing of relevance—all the materials requested. Therefore, Simmons has fulfilled each of the independent requirements for establishing a lack of relevance of the materials sought through the State's overly broad and burdensome discovery requests.

B. The Joint Defense Agreements are not Discoverable

As noted above, the State seeks to invade to province of Simmons's privilege by requesting that Simmons produce copies of any joint defense agreement executed in conjunction with this lawsuit. The State makes the incredible assertion that it requires access to these joint defense agreements in order that it might "evaluate Simmons's privilege claims in this litigation." *See* Motion to Compel at 10. Notably, this is the State's only justification for requesting documents which are privileged and otherwise irrelevant to any claim asserted by the State in this action. Consequently, the State has failed to show that any joint defense agreement falls within the purview of a discoverable document under the current version of Rule 26.

As an initial matter, the existence of any privilege is a matter of law exclusively within the Court's domain to evaluate and determine. *See, e.g., Dick v. Truck Ins. Exch.*, 386 F.2d 145, 147 n.2 (10th Cir. 1967); *SCO Group, Inc. v. Novell, Inc.*, 377 F. Supp. 2d 1145, 1152 (D. Utah 2005). Furthermore, a written agreement is not necessary for a party or parties to maintain a joint defense arrangement or to assert a claim of joint defense privilege. *United States v. Stepney*, 246 F. Supp. 2d 1069, 1080 n.5 (N.D. Cal.

2003). The existence of a written agreement merely assists *the trial court* in assessing whether a particular communication was made pursuant to a joint defense effort. *Id*.

That said, however, the joint defense agreements to which Simmons is a party in this lawsuit are protected by the common interest privilege in conjunction with either the attorney/client privilege or the attorney work product doctrine. *McNally Tunneling Corp. v. City of Evanston*, 2001 WL 1246630 (N.D. Ill. 2001). The common interest doctrine extends protections afforded by other doctrines, such as attorney client privilege and attorney work product, to protect privileged communications to disclosed to third parties sharing a common interest in the litigation that would otherwise constitute waiver. *Id*. at *2. The rationale for common interest protection is that "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 387 (M.D. N.C. 2003). Here, Simmons shares a common interest in the outcome of the litigation with its Co-Defendants named in this lawsuit and, accordingly, this is reflected in the joint defense agreements. The joint defense agreements contain both attorney/client communications and work product. Thus, Simmons's joint defense agreements are protected despite having been disclosed to the Co-Defendants because the common interest doctrine extends the attorney/client communications or work product protections to the other Co-Defendants.

Simmons's joint defense agreements are protected from discovery by the common interest doctrine in conjunction with the attorney/client privilege. *McNally*, 2001 WL 1246630 at * 4. The *McNally* court found that a joint defense agreement can be protected by attorney/client privilege where "(1) legal advice of any kind is sought, (2) from a

professional legal advisor in her capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor (8) except the protection be waived." *McNally*, 2001 WL 1246630 at * 4 (applying Illinois law). Here, Simmons's joint defense agreements meet these elements, and notwithstanding the fact that the State fails to cite authority to the contrary, they are therefore protected by the combination of the common interest doctrine and attorney/client privilege.

In addition, Simmons's joint defense agreements are protected from discovery by the common interest doctrine in conjunction with the work product doctrine. The *McNally* court held that, if disclosed, the joint defense agreement in that case was protected as work product to the extent that it would reveal mental impressions and thought processes of attorneys for the defendants sharing a common interest. *McNally*, 2001 WL 1246630 at * 4. The joint defense agreement in the *McNally* case described the co-defendant's joint defense strategy. *Id.* at * 3. That court further reasoned that the joint defense agreement was protected because it had been clearly prepared in anticipation of litigation and the document would reveal the mental processes of the City of Evanston's attorney regarding the possible defense to the litigation. *Id.*, at * 4. Here, Simmons's joint defense agreements were clearly prepared in anticipation of litigation and contain information that, if disclosed, would reveal attorneys' mental impressions and thought processes, such as litigation strategy. Therefore, Simmons's joint defense agreements in this lawsuit are protected by the common interest doctrine in combination with the attorney work product doctrine.

The State conveniently cites a case that applies the common interest and work product doctrines applied in *McNally*. *Power Mosfet Techs. v. Siemens* AG, 206 F.R.D. 422 (E.D. Tex 2000). However, even though the *Power Mofset* court correctly applies the same principles in its holding, that case is factually distinct from Simmons's case. *Id.* The court in *Power Mofset* found the joint defense agreement was not protected as work product because they did not reveal counsel's mental impressions or thought processes. *Id.* Here, Simmons's joint defense agreements contain information that, if disclosed, would reveal attorney's mental impressions and thought processes. Therefore, the court should not be mislead by the State's use of the *Power Mofset* holding, and find that Simmons's joint defense agreements are protected under the common interest and attorney work product doctrines.

The State has failed to establish the requisite proof required by Federal Rule of Civil Procedure 26(b)(3) to discover documents otherwise protected by the work product doctrine. The work product doctrine provides a qualified privilege that may be overcome if the party seeking discovery establishes either a 'substantial need' or 'undue hardship' argument that justifies disclosing the protected document or thing. *Id.*, at * 4 (discussing Fed. R. Civ. P. 26(b)(3)). As previously explained, the State has failed to show a substantial need or undue hardship to justify the need for obtaining Simmons's joint defense agreements despite work product protection. The State only alleges "[s]uch agreements are relevant inasmuch, to the extent there are any, they are necessary for the State to evaluate Simmons's privilege claims in this litigation." Motion to Compel at 10. This proposition is outrageous and falls well short of establishing 'substantial need' or 'undue hardship' necessary to satisfy Rule 26(b)(3) to obtain the joint defense agreement

over work product protection. As noted above, this Court has within its exclusive domain the ability to evaluate and determine whether a privilege exists. Therefore, the State has failed to overcome the protection afforded to Simmons's joint defense agreements by the common interest privilege in conjunction with either the attorney/client privilege or the attorney work product doctrine.

C. The State is not Entitled to Discover the Confidential Documents Reflecting the Implementation of the *City of Tulsa* Settlement

In its Request No. 6, the State seeks the production of documents relating to "the implementation of and compliance with the terms of the consent order entered in the [Tulsa lawsuit]." Once again, the State seeks documents that are neither relevant to the issues in its lawsuit against the Defendants, nor will this information lead to the discovery of admissible evidence. The Settlement Order establishes certain activities that must take place during the four years post-settlement, and dictates those items the participating defendants are required to fund. Case No. 01-CV-0900 EA(C), Docket No. 473. The Order also sets forth what elements of the post-settlement activities are to be made public in reports to the Court through the Special Master and Watershed Management Team. *Id.* at Ex. 1, Para. D(6), E(5), E(7). Accordingly, Simmons objected to this request and directed the Plaintiffs to the Court's Special Master, John Everett, J.D., P.E. to obtain those materials.

Despite the arguments advanced in its Motion for production of the "operational" documents from the Tulsa lawsuit, the State offered no justification for invading the Defendants confidential records to probe into the costs of the Tulsa settlement implementation funded by the participants beyond what Judge Eagan deemed necessary to disclose. The confidential elements of the Tulsa settlement and how they are being

accomplished have no bearing on any claim of liability or defense in the instant lawsuit. The very notion that the State can invade these financial details, which Simmons deems to be confidential, undermines the incentive any party would have for settling such a claim. Even the settling party, the City of Tulsa, has no right to discover this information, as all that is relevant in that case is whether the Order is being complied with and the specific reports the Court has required of the Special Master. The State has made no showing with regard to this material, and therefore, Simmons requests that the State's Motion with regard to Request No. 6 be denied.

CONCLUSION

For all of the above reasons, Defendant, Simmons Foods, Inc. respectfully requests the Court deny the State's August 24, 2006 motion to compel.

Respectfully submitted,

BY: /s/*Vicki Bronson*
John R. Elrod
Vicki Bronson, OBA 20574
Conner & Winters, LLP
211 E. Dickson St.
Fayetteville, AR 72701
(479) 582-5711

and

Richard Funk
Bruce Freeman
Conner & Winters
4000 One Williams Center
Tulsa, Oklahoma 74172
(918) 586-8977

ATTORNEYS FOR SIMMONS FOODS, INC.

CERTIFICATE OF SERVICE

I certify that on the 12th day of September 2006, I electronically transmitted the attached document to the following ECF registrants:

W. A. Drew Edmondson, Attorney General Kelly Hunter Burch, Assistant Attorney General J. Trevor Hammons, Assistant Attorney General Robert D. Singletary, Assistant Attorney General	drew_edmondson@oag.state.ok.us kelly_burch@oag.state.ok.us trevor_hammons@oag.state.ok.us robert_singletary@oag.state.ok
Douglas Allen Wilson Melvin David Riggs Richard T. Garren Sharon K. Weaver Riggs Abney Neal Turpen Orbison & Lewis	doug_wilson@riggsabney.com, driggs@riggsabney.com rgarren@riggsabney.com sweaver@riggsabney.com
Robert Allen Nance Dorothy Sharon Gentry Riggs Abney	rnance@riggsabney.com sgentry@riggsabney.com
J. Randall Miller David P. Page Louis W. Bullock Miller Keffer & Bullock	rmiller@mkblaw.net dpage@mkblaw.net lbullock@mkblaw.net
Elizabeth C. Ward Frederick C. Baker William H. Narwold Motley Rice **COUNSEL FOR PLAINTIFFS**	lward@motleyrice.com fbaker@motleyrice.com bnarwold@motleyrice.com
Stephen L. Jantzen Patrick M. Ryan Paula M. Buchwald Ryan, Whaley & Coldiron, P.C.	sjantzen@ryanwhaley.com pryan@ryanwhaley.com pbuchwald@ryanwhaley.com
Mark D. Hopson Jay Thomas Jorgensen Timothy K. Webster Sidley Austin LLP	mhopson@sidley.com jjorgensen@sidley.com twebster@sidley.com
Robert W. George Kutak Rock LLP **COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.**	robert.george@kutakrock.com
R. Thomas Lay Kerr, Irvine, Rhodes & Ables	rtl@kiralaw.com

Thomas J. Grever tgrever@lathropgage.com
Lathrop & Gage, L.C.
Jennifer S. Griffin jgriffin@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C .Senger dsenger@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks
Bassett Law Firm
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
Conner & Winters, P.C.

Bruce W. Freeman bfreeman@cwlaw.com
D. Richard Funk
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

John H. Tucker jtuckercourts@rhodesokla.com
Colin H. Tucker chtucker@rhodesokla.com
Theresa Noble Hill thillcourts@rhodesokla.com
Rhodes, Hieronymus, Jones, Tucker & Gable

Terry W. West terry@thewesetlawfirm.com
The West Law Firm

Delmar R. Ehrich dehrich@faegre.com
Bruce Jones bjones@faegre.com
Krisann Kleibacker Lee kklee@baegre.com
Dara D. Mann dmann@faegre.com
Faegre & Benson LLP
COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC

Jo Nan Allen jonanallen@yahoo.com
COUNSEL FOR CITY OF WATTS

Park Medearis medearislawfirm@sbcglobal.net
Medearis Law Firm, PLLC
COUNSEL FOR CITY OF TAHLEQUAH

Todd Hembree hembreelaw1@aol.com
COUNSEL FOR TOWN OF WESTVILLE

Tim K. Baker tbakerlaw@sbcglobal.net
Maci Hamilton Jessie maci.tbakerlaw@sbcglobal.net
Tim K. Baker & Associates
COUNSEL FOR GREENLEAF NURSERY CO., INC., WAR EAGLE FLOATS, INC., and TAHLEQUAH LIVESTOCK AUCTION, INC.

David A. Walls
Walls Walker Harris & Wolfe, PLLC wallsd@wwhwlaw.com
COUNSEL FOR KERMIT AND KATHERINE BROWN

Kenneth E. Wagner kwagner@lswsl.com
Marcus N. Ratcliff mratcliff@lswsl.com
Laura E. Samuelson lsamuelson@lswsl.com
Latham, Stall, Wagner, Steele & Lehman
COUNSEL FOR BARBARA KELLEY D/B/A DIAMOND HEAD RESORT

Linda C. Martin lmartin@dsda.com
N. Lance Bryan
Doerner, Saunders, Daniel & Anderson, LLP
COUNSEL FOR SEQUOYAH FUELS & NORTHLAND FARMS

Ron Wright ron@wsfw-ok.com
Wright, Stout, Fite & Wilburn
COUNSEL FOR AUSTIN L. BENNETT AND LESLIE A. BENNET, INDIVIDUALLY AND D/B/A EAGLE BLUFF RESORT

R. Jack Freeman jfreeman@grahamfreeman.com
Tony M. Graham tgraham@grahamfreeman.com
William F. Smith bsmith@grahamfreeman.com
Graham & Freeman, PLLC
COUNSEL FOR "THE BERRY GROUP"

Angela D. Cotner angelacotneresq@yahoo.com
COUNSEL FOR TUMBLING T BAR L.L.C. and BARTOW AND WANDA HIX

Thomas J. McGeady
Ryan P. Langston
J. Stephen Neas sneas@loganlowry.com

Bobby J. Coffman
Logan & Lowry, LLP
COUNSEL FOR LENA AND GARNER GARRISON; AND BRAZIL CREEK MINERALS, INC.

R. Pope Van Cleef, Jr. Popevan@robertsonwilliams.com
Robertson & Williams
COUNSEL FOR BILL STEWART, INDIVIDUALLY AND D/B/A DUTCHMAN'S CABINS

Lloyd E. Cole, Jr. colelaw@alltel.net
COUNSEL FOR ILLINOIS RIVER RANCH PROPERTY OWNERS ASSOCIATION; FLOYD SIMMONS; RAY DEAN DOYLE AND DONNA DOYLE; JOHN STACY D/B/A BIG JOHN'S EXTERMINATORS; AND BILLY D. HOWARD

Douglas L. Boyd dboyd31244@aol.com
COUNSEL FOR HOBY FERRELL and GREATER TULSA INVESTMENTS, LLC

Michael D. Graves mgraves@hallestill.com
D. Kenyon Williams, Jr. kwilliams@hallestill.com
COUNSEL FOR POULTRY GROWERS

William B. Federman wfederman@aol.com
Jennifer F. Sherrill jfs@federmanlaw.com
Federman & Sherwood

Teresa Marks teresa.marks@arkansasaag.gov
Charles Moulton charles.moulton@arkansag.gov
Office of the Attorney General
COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION

John B. DesBarres johnd@wcalaw.com
COUNSEL FOR JERRY MEANS AND DOROTHY ANN MEANS, INDIVIDUALLY AND AS TRUSTEE OF JERRY L. MEANS TRUST AND DOROTHY ANN MEANS TRUST; BRIAN R. BERRY AND MARY C. BERRY, INDIVIDUALLY AND D/B/A TOWN BRANCH GUEST RANCH; AND BILLY SIMPSON, INDIVIDUALLY AND D/B/A SIMPSON DAIRY

Carrie Griffith griffithlawoffice@yahoo.com
COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON

Reuben Davis rdavis@boonesmith.com
Michael A. Pollard mpollard@boonesmith.com
COUNSEL FOR WAUHILLAU OUTING CLUB

Monte W. Strout strout@xtremeinet.net
COUNSEL FOR CLAIRE WELLS AND LOUISE SQUYRES

Thomas Janer scmj@sbcglobal.net

Jerry M. Maddux
COUNSEL FOR SUZANNE M. ZEIDERS

Michael L. Carr mcarr@holdenokla.com
Michelle B. Skeens mskeens@holdenokla.com
Robert E. Applegate rapplegate@holdenokla.com
Holden & Carr
COUNSEL FOR SNAKE CREEK MARINA, LLC

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 North Classen
Oklahoma City, OK 73118
COUNSEL FOR PLAINTIFFS

Ancil Maggard
c/o Leila Kelly
2615 Stagecoach Drive
Fayetteville, AR 72703
PRO SE

Thomas C. Green
Sidley Austin Brown & Wood LLP
1501 K Street NW
Washington, DC 20005
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

James R. Lamb
Dorothy Jean Lamb
Strayhorn Landing
Rt. 1, Box 253
Gore, OK 74435
PRO SE

G. Craig Heffington
20144 W. Sixshooter Rd.
Cookson, OK 74427
ON BEHALF OF SIXSHOOTER RESORT AND MARINA, INC.

James C. Geiger
Kenneth D. Spencer
Jane T. Spencer
Address Unknown
PRO SE

Jim Bagby
Rt. 2, Box 1711
Westville, OK 74965
PRO SE

Robin Wofford
Rt. 2, Box 370
Watts, OK 74964
PRO SE

Doris Mares
Cookson Country Store and Cabins
32054 S. Hwy 82
P. O. B ox 46
Cookson, OK 74424
PRO SE

Richard E. Parker
Donna S. Parker
Burnt Cabin Marina & Resort, LLC
34996 South 502 Road
Park Hill, OK 74451
PRO SE

Eugene Dill
32054 S. Hwy 82
P. O. Box 46
Cookson, OK 74424
PRO SE

Gordon and Susann Clinton
23605 S. Goodnight Ln.
Welling, OK 74471
PRO SE

Marjorie A. Garman
Riverside RV Resort and Campground LLC
5116 Hwy. 10
Tahlequah, OK 74464
PRO SE

William and Cherrie House
P. O. Box 1097
Stillwell, OK 74960
PRO SE

/s/*Vicki Bronson*